RECORD AND BRIEFS

No. 15-827

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ENDREW F., A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS, JOSEPH F. AND JENNIFER F.,

Petitioner,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICI CURIAE* COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, CHILDREN AND ADULTS WITH ATTENTION-DEFICIT/HYPERACTIVITY DISORDER, AND THE CALIFORNIA ASSOCIATION FOR PARENT-CHILD ADVOCACY IN SUPPORT OF PETITIONER

Caroline J. Heller
Counsel of Record
GREENBERG TRAURIG, LLP
The MetLife Building
200 Park Avenue
New York, New York 10166
212-801-9200
hellerc@gtlaw.com

Selene Almazan-Altobelli
Alexis Casillas
Judith A. Gran
Catherine Merino Reisman
Ellen Saideman
COUNCIL OF PARENT ATTORNEYS AND ADVOCATES
Counsel for Amici Curiae
P.O. Box 6767
Towson, Maryland 21285
844-426-7224

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TABLE OF AUTHORITIES

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Cases

Bd. of Educ. of Evanston-Skokie Cmnty. Consol. Sch. Dist. 6J v. Risen, No. 12 C 5073, 2013 U.S. Dist. LEXIS 88575 (N.D. Ill. June 25, 2013) 22

Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley, 458 U.S. 176 (1982) ..... *passim*

Danielle G. v. N.Y.C. Dep't of Educ., No. 06-CV-2152 (CBA), 2008 WL 3286579 (E.D.N.Y. Aug. 7, 2008) 23

JSK by and through JK v. Hendry Cty. Sch. Bd., 941 F.2d 1563 (11th Cir. 1991) 9

L.O. v. N.Y.C. Dep't of Educ., 822 F.3d 95 (2d Cir. 2016) 19

M.B. ex rel. Berns v. Hamilton Se. Sch., 668 F.3d 851 (7th Cir. 2011) 9

Milliken v. Bradley, 418 U.S. 717 (1974) 7

Morgan v. Hennigan, 379 F. Supp. 410 (D. Mass. 1974) 7

Morgan v. Kerrigani, 388 F. Supp. 581 (D. Mass. 1975) 7

Page(s)

Mrs. B. v. Milford Bd. of Educ.,
103 F.3d 1114 (2d Cir. 1997) 9

O.S. v. Fairfax Cty. Sch. Bd.,
804 F.3d 354 (4th Cir. 2015)..... 8

P. v. Wissahickon Sch. Dist.,
No. 05-5196, 2007 U.S. Dist. LEXIS 44945
(E.D. Pa. June 20, 2007), *aff'd in part,*
rev'd in part on other grounds,
310 F. App'x 552 (3d Cir. 2009) 23

Federal Statutes

Americans with Disabilities Act,
42 U.S.C. § 12101 *et seq.*..... 1

Carl D. Perkins Vocational and Technical
Education Act, Pub. L. No. 98-524,
98 Stat. 2437 10

Civil Rights Act of 1871, ch. 22,
17 Stat. 13 (codified as amended
at 42 U.S.C. § 1983) 1

Education for All Handicapped
Children Act,
Pub. L. No. 94-142, 89 Stat. 773 (1975)... 4, 7

Education of the Handicapped Act
Amendments of 1990,
Pub. L. No. 101–476, 104 Stat. 1103
(1990)..... 11

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Individuals with Disabilities Education Act, Pub. L. No. 108-446, 118 Stat. 2647 (2004) 13

No Child Left Behind Act, Pub. L. No. 107-110, 115 Stat. 1425 (2002) 16

The Rehabilitation Act of 1973, Section 504, 29 U.S.C. § 794 1

20 U.S.C. § 1400 *et seq.* 1, 4, 13

20 U.S.C. § 1400(c)(5)(A) 14

20 U.S.C. § 1400(d)(1)(A) 2, 3

20 U.S.C. § 1401(9) 18

20 U.S.C. § 1401(a)(19) 11

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20 U.S.C. § 1414(a) 18

20 U.S.C. § 1414(b) 18

20 U.S.C. § 1414(b)(3)(B) 18

20 U.S.C. § 1414(b)(3)(C) 18

20 U.S.C. § 1414(c)(1)(A) 18

20 U.S.C. § 1414(c)(1)(B)(i), (d)(4)–(5)(A) 20

20 U.S.C. § 1414(d) 18

20 U.S.C. § 1414(d)(1)(A)(i)(II) 19

20 U.S.C. § 1414(d)(1)(A)(IV) 14

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20 U.S.C. § 1414(d)(4)(ii)(I) 20

20 U.S.C. § 2301 *et seq*. 10

20 U.S.C. § 6301 *et seq*. 12

20 U.S.C. § 6301(1) 16

20 U.S.C. § 6311(a)(1)(B) 16

20 U.S.C. § 6311(b)(2)(D) 17

State Statutes

Mass. Gen. Laws ch. 69,
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Federal Regulations

34 C.F.R. Pt. 300, app. A, § IV, at 115 23

34 C.F.R. § 300.324 20

34 C.F.R. § 300.324(a)(1)(iii) 18

42 Fed. Reg. 42474 (Aug. 23, 1977) 7

71 Fed. Reg. 46540 (Aug. 14, 2006) 15

80 Fed. Reg. 50773 (Aug. 21, 2015) 15

Legislative Materials

S. Rep. No. 108-185 (2003) 14

Page(s)

Other Authorities

California Dep't of Educ., Special Educ. Div., *Special Education Self-Review: Instructions and Forms Manual* (revised October 14, 2013), https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwilrK3Clb-bQAhUrj1QKHfTDCagQFgggMAA&url=ftp%3A%2F%2Fftp.cde.ca.gov%2Fsp%2Fse%2Fds%2F2013-14%2520SESR%2F2013-14%2520SESR%2520Instruction%2520Manual.doc&usg=AFQjCNEQ9QmUiayeedclTWITerbWdGmhmA..... 21

Diane M. Browder, et al., *Creating Access to the General Curriculum with Links to Grade-Level Content for Students with Significant Cognitive Disabilities: An Explication of the Concept*, 41 J. Special Educ. 2 (2007)..... 16

Ginevra Courtade, et al., *Seven Reasons to Promote Standards-Based Instruction for Students with Severe Disabilities: A Reply to Ayres, Lowrey, Douglas, & Sievers (2011)*, 47(1) Educ. & Training in Autism & Developmental Disabilities 3 (2012).... 15

Page(s)

Jan Hoffman,
Helping Autistic Students Navigate Life on Campus, N.Y. Times, Nov. 20, 2016 ... 17

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Educational Benefit Review Process: A Reflective Process to Examine the Quality of IEPs, State Educ. Res. Ctr. of Conn., at 3, http://www.ctserc.org/assets/documents/news/2013/serc-edbenefit.pdf (last visited Nov. 18, 2016) 20

Penn. Dep't of Educ.,
Educational Benefit Review (EBR), 2 Special Education Leader 1 (August 1, 2014), http://pattan.net-website.s3.amazonaws.com/images/2014/09/26/LDR_2_1_EBR0814.pdf..... 21

Richard W. Riley,
The Improving America's Schools Act of 1994, Reauthorization of Elementary and Secondary Education Act, U.S. Dep't of Educ., at 4 (Sept. 1995), https://www2.ed.gov/offices/OESE/archives/legislation/ESEA/brochure/iasa-bro.html 11

Page(s)

U.S. Dep't of Educ., Office of Special Educ. and Rehab. Servs., *OSERS Dear Colleague Letter on Free and Appropriate Public Education (FAPE)*, at 1 (Nov. 16, 2015), http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/guidance-on-fape-11-17-2015.pdf 15, 19

V. Mark Durand, *Using Functional Communication Training as an Intervention for the Challenging Behavior of Students with Severe Disabilities* (May 1993), http://eric.ed.gov/?id=ED359697 23

STATEMENT OF INTEREST OF *AMICI CURIAE*

Council of Parent Attorneys and Advocates ("COPAA") is a not-for-profit organization for parents of children with disabilities, their attorneys and advocates.[1] COPAA believes effective educational programs for children with disabilities can only be developed and implemented with collaboration between parents and educators as equal parties. COPAA does not represent children but provides resources, training, and information for parents, advocates, and attorneys to assist them in obtaining the free appropriate public education such children are entitled to under the Individuals with Disabilities Education Act ("IDEA" or "Act"), 20 U.S.C. § 1400 *et seq.* COPPA's attorney members represent children in civil rights matters. COPAA also supports individuals with disabilities, their parents, and advocates, in seeking to safeguard the civil rights guaranteed to those individuals under federal laws, including the Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983) ("Section 1983"), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504") and the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* ("ADA").

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[1] Both parties have given written consent to the filing of all amicus briefs. No counsel for a party authored this brief in whole or in part, and no person other than amicus, its members, or their counsel made a monetary contribution to the preparation or submission of this brief.

COPAA brings to the Court the unique perspective of parents, advocates, and attorneys for children with disabilities. Many children with disabilities experience significant challenges. Whether these children eventually gain employment, live independently, and become productive citizens depends in large measure on whether they secure their right to the free appropriate public education guaranteed under the IDEA and other educational policies. Indeed, the soul of the IDEA is its codified goal that "all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living . . . ." 20 U.S.C. § 1400(d)(1)(A).

Through its work with parent, advocate, and attorney members across the United States, COPAA understands the real world importance of an universally applicable, clearly defined legal standard, consistent with the intent and purpose of the IDEA, concerning the educational benefit that school districts must confer on children with disabilities to provide them with the free appropriate public education guaranteed by the IDEA, the question before the Court in this case.

Children and Adults with Attention-Deficit/ Hyperactivity Disorder ("CHADD"), a 501(c)(3) not-for-profit organization, is the largest national organization representing children and adults with attention-deficit/hyperactivity disorder. Founded

in 1987, CHADD currently has approximately 10,000 individual members and 2,000 professional members. CHADD works to ensure that the rights of students with disabilities under the IDEA, Section 504 and the ADA are protected through legislative advocacy, training and public awareness. CHADD is dedicated to ensuring that students covered by the IDEA receive a free appropriate public education that "emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living . . . ." 20 U.S.C. § 1400(d)(1)(A).

The California Association for Parent-Child Advocacy ("CAPCA") is a volunteer-based organization engaging in legislative and policy advocacy on matters of concern to students with disabilities in California. Members of CAPCA participate as professionals and/or as family members of students with disabilities, in Individualized Education Program meetings, resolution sessions, mediations, due process hearings and appeals throughout California. CAPCA was founded in 2003 when parents and advocates came together to resist proposals in the California legislature to drastically shorten the statute of limitations in special education cases and to impose other restrictions on the exercise of parental and student rights.

SUMMARY OF THE ARGUMENT

This Court has been asked to decide: "What is the level of educational benefit that school districts must confer on children with disabilities to provide them with a free and appropriate public education guaranteed by the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*" The Respondent proposes that this Court adopt the lax and vague standard that school districts need only confer "more than *de minimis* educational benefit" in order to meet the IDEA's requirements, Supplemental Brief in Opposition to Petition for Writ of Certiorari for Respondent at 1, *Endrew F. v. Douglas County School District Re-1*, No. 15-827 (Sept. 6, 2016), but this standard is contrary to the plain language of the IDEA, its legislative history, and this Court's decision in *Board of Education of Hendrick Hudson Central School District, Westchester County v. Rowley*, 458 U.S. 176 (1982). More importantly it stands at odds with the achievement driven educational policies that have replaced the access approach to educational policy that this Court perceived in *Rowley*.

In 1975, gross disparities in access to educational programming and school campuses for students with disabilities prompted Congress to enact the Education for All Handicapped Children Act ("EHA"), Pub. L. No. 94-142, 89 Stat. 773, to guarantee that children with disabilities obtain a "free appropriate public education." Just seven years later, in 1982, this Court considered, *inter alia*: "What is meant by the Act's requirement of a 'free

appropriate public education'?" *Rowley*, 458 U.S. at 186. Against the historical backdrop of an educational policy that focused on children with disabilities obtaining access to public school campuses and receiving any education, whatsoever, this Court "conclude[d] that the 'basic floor of opportunity' provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *Id.* at 201.

However, since this Court issued its decision in *Rowley*, educational policy has steadily shifted away from framing educational benefits for children with disabilities (and others) in terms of access to education and focusing, instead, on standardized academic achievement to progress. Thus, any effort to quantify the amount of educational benefits required by the Act, in light of *Rowley*'s "basic floor of opportunity" approach is analogous to forcing an access-driven peg into, what is now, an achievement-based hole. The result of which is that courts have attempted to craft convoluted and often meaningless standards to determine whether a school district has conferred an educational benefit upon a child with disabilities. This effort has caused entirely inconsistent outcomes across the United States.

Because of the significant intervening legal, policy, and educational developments since *Rowley*, *Amici* propose the following standard: A child "benefits from" instruction when the services target all areas of educational need in order to ensure achieve-

ment consistent with non-disabled peers in the general education curriculum so as to enable students to be prepared for post-school activities.

Once a parent challenging his or her child's individualized education program has demonstrated the child has failed to progress commensurately with nondisabled peers in the general education curriculum, the court's inquiry then shifts to determining whether the school district's most recent assessments and evaluations, initial individualized education program planning, and recalculation in light of lack of expected progress has all occurred pursuant to the requirements laid out in 20 United States Code Section 1414, as discussed below. Because Congress intended this country's education policy to further the ultimate goals of learning and close achievement gaps between all students in that high-expectations general education curriculum, departures from either the rate of learning on a particular campus, from the overall content expected to be mastered, or the focus in the general education at all must be justified by the assessments, data, and planning Congress established for understanding how educational decisions were to be made for each individual student.

ARGUMENT

I. *Rowley* Instructs Federal Courts to Consider and Adhere to Federal Education Policy in Construing IDEA's Obligations

This Court decided *Rowley* only seven years after Congress determined that students had a right to be educated in public school settings regardless of their disability status, Pub. L. No. 94-142, 89 Stat. 773 (1975), and only five years after the clarifying regulations were finalized in 1977, Education of Handicapped Children: Implementation of Part B of the Education of the Handicapped Act, 42 Fed. Reg. 42474 (1977). The *Rowley* decision also came on the heels of the racial desegregation efforts across the country, *see e.g.*, *Morgan v. Hennigan*, 379 F. Supp. 410, 482–83 (D. Mass. 1974) (ordering desegregation of the Boston Public School Systems) *supplemented in Morgan v. Kerrigani*, 388 F. Supp. 581 (D. Mass. 1975); *see also Milliken v. Bradley*, 418 U.S. 717 (1974) (addressing desegregation plans in Detroit). Given this backdrop and the focus on access to schools for all children across the country, it is unsurprising that this Court concluded in *Rowley* that "[w]e would be less than faithful to our obligation to construe what Congress has written if in this case we were to disregard the statutory language and legislative history of the Act by concluding that Congress had imposed upon the States a burden of unspecified proportions and weight, to be revealed only through case-by-case adjudication in the courts." 458 U.S. at 190, n.11.

Rowley emphasized that courts must look to federal policy, as well as the explicit definition in the IDEA, to ascertain the substantive rights conferred by the Act. Specifically, this Court stated, "[w]e are loath to conclude that Congress failed to offer any assistance in defining the meaning of the principal substantive phrase used in the Act. It is beyond dispute that, contrary to the conclusions of the courts below, the Act does expressly define 'free appropriate public education' . . . ." *Id.* at 187.

Rowley goes on to state: "Thus, if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a 'free appropriate public education' as defined by the Act." *Id.* at 189. The "other items from the definitional checklist" require that instruction and services: (i) "be provided at public expense and under public supervision"; (ii) "meet the State's educational standards"; (iii) "approximate the grade levels used in State's regular education"; and (iv) "comport with the child's IEP." *Id.*

Following *Rowley,* federal courts have employed a variety of adjectives—"some," "minimal," "meaningful,"—and the phrase "more than *de minimis*," in attempts to quantify how much educational benefit an individualized education program ("IEP") need confer upon a child to provide a free appropriate public education ("FAPE") under the IDEA. *See O.S. v. Fairfax Cty. Sch. Bd.*, 804 F.3d 354, 360 (4th Cir. 2015) (noting that the Fourth Circuit's

"standard remains the same as it has been for decades: a school provides a FAPE so long as a child receives some educational benefit, meaning a benefit that is more than minimal or trivial . . . "); *M.B. ex rel. Berns v. Hamilton Se. Sch.*, 668 F.3d 851, 862 (7th Cir. 2011) (agreeing that a student who makes just more than trivial progress has received a FAPE); *Mrs. B. v. Milford Bd. of Educ.*, 103 F.3d 1114, 1120 (2d Cir. 1997) (describing that a state IEP must be reasonably calculated to provide some "meaningful" benefit (citing *Rowley*, 458 U.S. at 192)); *JSK by and through JK v. Hendry Cty. Sch. Bd.*, 941 F.2d 1563, 1572–73 (11th Cir. 1991) ("[w]hile a trifle might not represent adequate benefits," some benefit is all that is required) (internal quotation marks omitted).

However, these adjectives generate the misconception that the IDEA requires a set, quantifiable amount of educational benefits for all children with disabilities when, in fact, the educational benefit required by the IDEA will vary from child to child because the IDEA also requires that programs and services must be "individually tailored" and "reasonably calculated" in light of the specific student's unique needs. As discussed more fully in the next section, the standards articulated by federal courts, in attempting to quantify the amount of educational benefit an IEP must provide, fail to take into account changes in the law, as well as changes in federal educational policy. Accordingly, pursuant to the IDEA, to the extent that the students are not making progress in the general edu-

cation curriculum commensurate with their non-disabled peers, educational benefit inquiry must be addressed in light of the students' unique needs as reflected in recent evaluations and data available to the IEP teams.

II. The Legal and Educational Policy Landscape Has Changed Since *Rowley*

The history of education in the United States has come a long way since *Rowley*, and the context of educational entitlements during the 1970s through the 1980s were very different from what they are today. The 1975 statute had ended the exclusion of large numbers of children with disabilities from public school, but since the early 1980s, Congress has determined that mere access to education is not enough. Public education policy agenda and statute after statute has established a substantive and achievement-driven basic floor of educational opportunity which ***all*** students, not just students with disabilities, must reach.

Shortly after this Court decided *Rowley*, educational policy changed from addressing integration and access to addressing educational results. In 1984, the Carl D. Perkins Vocational and Technical Education Act, Pub. L. No. 98-524, 98 Stat. 2437 (current version at 20 U.S.C. § 2301 *et seq.* (2006)), was passed with the goal of increasing vocational-technical education in the United States. In line with the shifting focus to outcomes, in 1990, eight years after *Rowley*, Congress reauthorized the IDEA—the successor to Pub. L. No. 94-142—and

added requirements that transition services be included in IEPs so as to prepare students for post-secondary life. *See* Pub. L. No. 101–476, 104 Stat. 1103, 1103–04 (1990) (amending 20 U.S.C. § 1401(a)(19) to read "[t]he term 'transition services' means a coordinated set of activities for a student, designed within an outcome-oriented process, which promotes movement from school to post-school activities, including post-secondary education, vocational training, integrated employment (including supported employment) . . . ").

The shift from an access-driven to a results-oriented educational agenda continued in the 1990s through the 2000s. In 1993, Massachusetts enacted the Massachusetts Education Reform Act, which created standardized tests as a measure of student achievement and progress towards general education curriculum measures. Mass. Gen. Laws ch. 69, §§ 1D-1G (1993). In 1994, President Clinton signed into law a reauthorization of the Elementary and Secondary Education Act of 1965, now referred to as the Improving America's Schools Act ("IASA"), with provisions for increased funding for education of students with higher needs (bilingual and immigrant education), and a focus on preparing students to "meet high academic standards in order to succeed." Richard W. Riley, *The Improving America's Schools Act of 1994, Reauthorization of Elementary and Secondary Education Act*, U.S. Dep't of Educ., at 4 (Sept. 1995), https://www2.ed.gov/offices/OESE/archives/legislation/ESEA/brochure/iasa-bro.html.

In 2001, Congress and President George W. Bush built on the IASA's focus on a core of challenging state standards and expanded on Massachusetts's efforts, resulting in the No Child Left Behind Act ("NCLB") being signed into law on January 8, 2002. *See* Pub. L. No. 107-110, 115 Stat. 1425 (2002) (current version at 20 U.S.C. § 6301 *et seq.* (2015)). The NCLB had the overarching purpose of ensuring "that all children [receive] a fair, equal, and significant opportunity to obtain a high-quality education" and to close educational achievement gaps. Pub. L. No. 107-110, 115 Stat. 1425, 1439–40 (2002). Academic accountability was the cornerstone of NCLB, which asked schools to develop educational programming so as to ensure that each student reached at a minimum, proficiency, on challenging State academic achievement standards and state academic assessments. *Id.* Moreover, NCLB specifically called for our educational system to:

> (1) ensur[e] that high-quality academic assessments, accountability systems, teacher preparation and training, curriculum, and instructional materials are aligned with challenging State academic standards so that students, teachers, parents, and administrators can measure progress against common expectations for student academic achievement;
>
> (2) meet[] the educational needs of low-achieving children in our Nation's highest-poverty schools, limited English proficient children, migratory children, ***children***

> ***with disabilities,*** Indian children, neglected or delinquent children, and young children in need of reading assistance; . . .
>
> (4) hold[ ] schools, local educational agencies, and States accountable for improving the academic achievement of all students, and identifying and turning around low-performing schools that have failed to provide a high-quality education to their students, while providing alternatives to students in such schools to enable the students to receive a high-quality education.

Id. (emphasis added).

In 2004, after aligning the basic floor of educational expectations with the "high-quality education" standards in NCLB, Congress reauthorized the IDEA again, strengthening the systems for developing student programs and evaluating progress. Pub. L. No. 108-446, 118 Stat. 2647 (2004) (current version at 20 U.S.C. § 1400 *et seq.* (2015)).

Borrowing on the ideas and maxims in NCLB, Congress wrote that:

> Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by—(A) having high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible, in order to—(i) meet developmen-

> tal goals and, ***to the maximum extent possible, the challenging expectations that have been established for all children***; and (ii) be prepared to lead productive and independent adult lives, to the maximum extent possible . . .

Pub. L. No. 108-446, 118 Stat. 2647, 2649 (2004) (current version at 20 U.S.C. § 1400(c)(5)(A) (2015)) (emphasis added).

The Senate Report accompanying the 2004 reauthorization of the IDEA also provided that "[f]or most students with disabilities, many of their IEP goals would likely conform to State and district wide academic content standards and progress indicators consistent with standards based reform within education and the new requirements of NCLB." S. Rep. No. 108-185, at 29 (2003); *see also* Pub. L. No. 108-446, 118 Stat. 2647, 2708 (current version at 20 U.S.C. § 1414(d)(1)(A)(IV) (2015)) (explaining that to achieve the IDEA's goals, the statute requires that an IEP provide such special education, related services, and supports necessary to: "advance appropriately toward attaining the annual goals . . . [and] ***to be involved in and make progress in the general education curriculum*** . . . .") (emphasis added).

The Analysis of Comments and Changes accompanying the 2006 IDEA Part B regulations also explained that "§ 300.320(a)(1)(i) clarifies that the general education curriculum means the same curriculum as all other children. Therefore, an IEP

that focuses on ensuring that the child is involved in the general education curriculum will necessarily be aligned with the State's content standards." *Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities*, Final Rule, 71 Fed. Reg. 46540, 46662 (Aug. 14, 2006).[2] Indeed, researchers have documented the success of an approach that provides access to general education standards for students with disabilities. *See* Ginevra Courtade, et al., *Seven Reasons to Promote Standards-Based Instruction for Students with Severe Disabilities: A Reply to Ayres, Lowrey, Douglas, & Sievers (2011)*,

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[2] *See also* U.S. Dep't of Educ., Office of Special Educ. and Rehab. Servs., *OSERS Dear Colleague Letter on Free and Appropriate Public Education (FAPE)*, at 1 (Nov. 16, 2015), http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/guidance-on-fape-11-17-2015.pdf ("To help make certain that children with disabilities are held to high expectations and have ***meaningful*** access to a State's academic content standards . . . [and] to clarify that an [IEP] for an eligible child with a disability under the [IDEA] must be aligned with the State's academic content standards for the grade in which the child is enrolled.") (emphasis added); *Improving the Academic Achievement of the Disadvantaged; Assistance to States for the Education of Children With Disabilities*, Final Rule, 80 Fed. Reg. 50773, 50773–74 (Aug. 21, 2015) (describing how States are "no longer authorize[d] . . . to define modified academic achievement standards . . . for eligible students with disabilities" because "[s]ince these regulations went into effect, additional research has demonstrated that students with disabilities who struggle in reading and mathematics can successfully learn grade-level content and make significant academic progress when appropriate instruction, services, and supports are provided.") *Id.* (footnote omitted).

47(1) Educ. & Training in Autism & Developmental Disabilities 3, 3–5 (2012).[3]

The most recent iterations of the IDEA continued Congress's policy of shifting from an access-driven to an achievement-based educational agenda, and were ***absolutely intended*** to align with the shifting educational agenda, set forth in NCLB, of "high-quality education" based on "academic assessments, accountability systems, teacher preparation and training, curriculum, and instructional materials . . . aligned with challenging State academic standards." Pub. L. No. 107-110, 115 Stat. 1425, 1439 (current version at 20 U.S.C. § 6301(1) (2015)).

In fact, the most recent iteration of our education policy, the Every Student Succeeds Act ("ESSA"), specifically contemplates coordination with the IDEA, 20 U.S.C. § 6311(a)(1)(B) (2015), and expects students with disabilities would meet the same standards as their non-disabled peers except for in cases of "students with the most significant cogni-

[3] "Through [the IDEA] policies, the expectation for students with significant cognitive disabilities has evolved from simply participating in assessment; to the documented achievement of adequate yearly progress in reading, math, and science; to the expectation that these assessments document achievement with clear links to state grade-level content standards, even when applying alternate achievement standards for this population." Diane M. Browder, et al., *Creating Access to the General Curriculum with Links to Grade-Level Content for Students with Significant Cognitive Disabilities: An Explication of the Concept*, 41 J. Special Educ. 2, 2 (2007).

tive disabilities." 20 U.S.C. § 6311(b)(2)(D) (intending to ensure that no more than 1% of the total number of students in a State may be assessed using alternate assessments in any subject). Indeed, the New York Times recently noted that early intervention and education in the mainstream, which includes a focus on academic achievement, required by IDEA, has contributed to the growing numbers of students with autism entering college, with opportunities that "could not have been imagined had they been born even a decade earlier." Jan Hoffman, *Helping Autistic Students Navigate Life on Campus*, N.Y. Times, Nov. 20, 2016, at A1.

III. IDEA Imposes Specific Obligations on School Districts and the School District Failed to Comply with These Obligations in this Case

A. IDEA Contains Substantive Requirements for Appropriate Programming

This Court's decision in *Rowley* requires "personalized instruction" with "sufficient supportive services." 458 U.S. at 189. The only way to determine whether the IEP meets these requirements is to analyze whether a school district has complied with ***all*** of the substantive obligations created by the IDEA.

1. School Districts Must Evaluate Children in All Areas of Suspected Disability and Use the Evaluation as the Foundation for Developing a Program and Goals

The IDEA provides that all students, suspected of having a disability as well as those already determined to be IDEA-eligible, have to be evaluated upon suspicion of disability, and subsequently no less than once every three years. 20 U.S.C. § 1414(a) (2015). These evaluations must assess the child in "all areas of suspected disability." *Id.* § 1414(b)(3)(B). Evaluations must provide "relevant information that directly assists persons in determining the educational needs of the child . . . ." *Id.* § 1414 (b)(3)(C). Indeed, the Act and its implementing regulations require school districts, in developing a child's IEP, to consider the most recent evaluative data of the child, *see id.* § 1414(c)(1)(A); 34 C.F.R. § 300.324(a)(1)(iii) (2016), and evaluations are considered a foundation for the IEP. *See* 20 U.S.C. § 1414 (b), (d).

The Second Circuit recently held that:

> The purpose of the requirement is to ensure that a [school district], in formulating a student's IEP, provides the student with services narrowly tailored to his or her particular educational needs based on actual and recent evaluative data from the student's education providers, so that the developed IEP will reasonably enable the

> child to receive the educational benefits to which he or she is entitled by law.

L.O. v. N.Y.C. Dep't of Educ., 822 F.3d 95, 111 (2d Cir. 2016).

2. School Districts Must Develop Measurable Goals to Address the Student's Disability-Related Needs that Ensure Progress in the General Education Curriculum

School Districts must develop measurable goals designed to address disability-related needs so as to enable the student to be involved in and ***make progress in*** the general education curriculum. 20 U.S.C. § 1414(d)(1)(A)(i)(II) (emphasis added). For many children, that means creating high, yet achievable, goals in line with grade-level general education curriculum so as to meet the State academic content standards, 20 U.S.C. § 1401(9), even if that requires presenting grade-level content in a modified way. *See OSERS Dear Colleague Letter on Free and Appropriate Public Education (FAPE)*, *supra* note 2, at 6–7.

The IEP team may, after careful consideration of all evaluative data, determine that the child needs goals aligned with alternate standards. In such a case, the goals must align with the State's grade-level content standards for students in the general education curriculum.

3. IDEA Explicitly Requires Course Correction if a Child Is Not Making Progress

The clearest indication of how procedural compliance with the requirements of the IDEA does not, alone, demonstrate a student has received educational benefit can be found in the obligation that school districts continually update assessment and data collection, and then update the IEP to ensure that a student's progress and goals adhere as closely as possible to the high-quality general education academic standards. Congress realized, at various points of reauthorization, that the planning and initial offering of a particular educational program and course of study would not always lead to a program that would enable the student to make adequate educational progress. As such, the IDEA requires that the school district make changes in the goals or the services in the IEP to enable the student to make progress. 20 U.S.C. § 1414(c)(1)(B)(i), (d)(4)–(5)(A); 34 C.F.R. § 300.324. Thus, IDEA mandates that the IEP Team a ddress "any lack of expected progress toward the annual goals and in the general education curriculum, where appropriate . . . ." 20 U.S.C. § 1414(d)(4)(ii)(I).[4]

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[4] As part of their obligation to monitor local school districts, several states have adopted a formal Educational Benefit Review ("EBR") protocol that carefully examines whether students have made expected annual progress, and, if not, whether sufficient educational services were provided. *See* Kimberly A. Mearman, *Educational Benefit Review Process: A*

B. The Tenth Circuit Failed to Apply These Standards Appropriately to *Endrew F.*

Had the Tenth Circuit in *Endrew F. v. Douglas County School District Re-1*, measured Endrew's

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Reflective Process to Examine the Quality of IEPs, State Educ. Res. Ctr. of Conn., at 3, http://www.ctserc.org/assets/documents/news/2013/serc-edbenefit.pdf (last visited Nov. 18, 2016); Penn. Dep't of Educ., *Educational Benefit Review (EBR)*, 2 Special Education Leader 1, 2-3 (August 1, 2014), http://pattan.net-website.s3.amazonaws.com/images/2014/09/26/LDR_2_1_EBR0814.pdf; California Dep't of Educ., Special Educ. Div., *Special Education Self-Review: Instructions and Forms Manual*, at 21-24 (revised October 14, 2013), https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwilrK3ClbbQAhUrj1QKHfTDCagQFgggMAA&url=ftp%3A%2F%2Fftp.cde.ca.gov%2Fsp%2Fse%2Fds%2F2013-14%2520SESR%2F2013-14%2520SESR%2520Instruction%2520Manual.doc&usg=AFQjCNEQ9QmUiayeedclTWITerb-WdGmhmA. Indeed, EBR protocols are designed to determine whether students' IEPs offered educational benefits by evaluating whether the IEPs complied with the explicit substantive requirements of IDEA cited herein. This EBR protocol thus recognizes the relationship between good educational programs and expected student progress; students are more likely to make good progress in good educational programs than in bad ones. Focusing on whether the student made any progress at all on any goal, as the Tenth Circuit did here, ignores the school district's responsibility to assist students with disabilities in making appropriate annual yearly progress on all educational goals, and instead results in lowering expectations and providing lesser services for students who do not make adequate progress, rather than improving their educational programs so that the students can make good progress.

("Drew") educational program against IDEA's specific requirements, it would have determined that the IEP failed to target all areas of educational need. Additionally, Drew made no progress in a number of educational and functional goals, and his behaviors escalated over a two-year period to the point that his behaviors were a substantial impediment to any educational progress. *See Endrew F.*, 798 F.3d 1329, 1335–37 (10th Cir. 2015). Had the Tenth Circuit evaluated Drew's educational program against IDEA's specific requirements, it would have determined that the school district failed to make any changes to Drew's program reasonably calculated to address these behavioral problems.

When behavior is "a central component" of a child's disability, and the IEP fails to address the "significant behavioral issues," that deficiency alone may render an IEP substantively inadequate. *Bd. of Educ. of Evanston-Skokie Cmnty. Consol. Sch. Dist. 6J v. Risen*, No. 12 C 5073, 2013 U.S. Dist. LEXIS 88575, at *57 (N.D. Ill. June 25, 2013). An IEP's failure to provide a Functional Behavioral Assessment (FBA)[5] and a Behavioral Intervention

[5] Functional Behavioral Assessment (FBA) is a results-oriented approach to behaviors, closely examining the function that the behavior serves for the individual, typically through observation and data collection, developing a hypothesis of the purpose the behavior serves and then working to replace the challenging behavior with more appropriate behaviors or skills. For example, for some individuals who have communication disabilities, challenging behaviors serve

Plan (BIP) to address behaviors impeding learning may itself constitute the denial of a FAPE. *P. v. Wissahickon Sch. Dist.*, No. 05-5196, 2007 U.S. Dist. LEXIS 44945, at *28–29, *34–35 (E.D. Pa. June 20, 2007) (ordering reimbursement of tuition where failure to create a BIP constituted denial of a FAPE), *aff'd in part, rev'd in part on other grounds*, 310 F. App'x 552 (3d Cir. 2009); *see also Danielle G. v. N.Y.C. Dep't of Educ.*, No. 06-CV-2152 (CBA), 2008 WL 3286579, at *10–12, *15 (E.D.N.Y. Aug. 7, 2008) (reversing findings of IHO and SRO and holding that an IEP's failure to include an FBA and BIP, among other deficiencies, deprived the student of a FAPE). This principle is supported by the official commentary to the federal regulations, which expressly states, "a failure to . . . consider and address [behaviors impeding learning] in developing and implementing the child's IEP would constitute a denial of [a] FAPE to the child." 34 C.F.R. Pt. 300, app. A, § IV, at 115.

In short, Drew's program did not comply with the IDEA because the IEP team failed initially to target all areas of educational need in designing the program. The IEP team compounded this error when it failed to recognize, and correct, the deficiencies in Drew's program. Consequently, the

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the function of communication and teaching the student better methods of communication can successfully address the challenging behaviors. *See* V. Mark Durand, *Using Functional Communication Training as an Intervention for the Challenging Behavior of Students with Severe Disabilities* (May 1993), http://eric.ed.gov/?id=ED359697.

school district failed to provide Drew services addressing all areas of his educational need, thus failing to ensure achievement in the general education curriculum consistent with his peers without disabilities. This deprivation amounted to a denial of a free appropriate public education.

CONCLUSION

In the more than 40 years since Congress passed the EHA and the nearly 35 years since this Court decided *Rowley*, in recognition that mere physical "access" to education had been achieved for children with disabilities, numerous amendments to the Act and other educational laws have shifted educational policy away from mere "access" to the schoolroom and towards the goal of standardized academic achievement and progress for all children with disabilities. Consistent with that goal, *Amici* therefore urge the Court to hold that an IEP confers educational benefit when the school district complies with IDEA's substantive obligations in order to target all areas of a student's educational needs to ensure achievement in the general educational curriculum consistent with his or her peers without disabilities. The importance of this universally applicable, clearly defined legal standard, consistent with the intent and purpose of the IDEA and federal educational policy cannot be gainsaid. A free appropriate public education that confers educational benefits consistent with this standard will enable children with disabilities to attend college, graduate school or professional school, obtain

vocational training, obtain employment, and gain self-sufficiency, *i.e.* become productive citizens. *Amici* respectfully request that the Court reverse the judgment of the Tenth Circuit Court of Appeals.

Respectfully submitted,

Caroline J. Heller
Counsel of Record
GREENBERG TRAURIG, LLP
The MetLife Building
200 Park Avenue
New York, New York 10166
212-801-9200
hellerc@gtlaw.com

Selene Almazan-Altobelli
Alexis Casillas
Judith A. Gran
Catherine Merino Reisman
Ellen Saideman
COUNCIL OF PARENT ATTORNEYS AND ADVOCATES
Counsel for Amici Curiae
P.O. Box 6767
Towson, Maryland 21285
844-426-7224

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